



**Committee on Foreign Investment in the United States:
Background, Recent Developments, and Implications for
Investments in the U.S. Semiconductor Industry**

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What is CFIUS?

Committee on Foreign Investment in the United States

- Implements Section 721 of the Defense Production Act by reviewing “covered transactions” and assessing national security risks
- CFIUS may:
 - Clear transactions
 - Negotiate agreements to mitigate national security concerns
 - Permit parties to withdraw with no action
 - Block transactions
 - Refer the case to the President for decision (with CFIUS recommendation)
- Decisions are entirely discretionary and generally not subject to judicial review
- Presidential orders can be issued post-closing and may require divestiture
- Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) clarified and expanded CFIUS jurisdiction and introduced new procedural elements
 - Interim implementing regulations issued in October 2018; full set of proposed regulations published in September 2019 and will be finalized by February 2020

Which Transactions are Subject to CFIUS Jurisdiction?

Covered Transactions: Foreign Acquisitions of “Control”

- Foreign person acquisition of “control” of an existing U.S. business
 - Generally, investments over 10% equity
 - Investments under 10% if coupled with other indicia of control (e.g., board seat)
 - Only a few assets may constitute a “business”
- Joint ventures where a party contributes a U.S. business
- Changes in control of foreign parent of a U.S. business
 - For transactions outside the United States, CFIUS is only concerned with U.S. businesses of the foreign target
- **Safe harbor:** Passive investments of 10% or less are outside scope of CFIUS jurisdiction

Covered Transactions: Foreign Acquisitions of “Control”

- **Loan transactions** are not covered unless the lender obtains unusual governance rights
- CFIUS determines whether **convertible debt** is a covered transaction on a case-by-case basis, taking into account:
 - (1) The imminence of conversion
 - (2) Whether conversion depends on factors within the control of the acquiring party, and
 - (3) Whether the amount of voting interest and the rights that would be acquired upon conversion can be reasonably determined at the time of debt acquisition
- **Long-term leases:** Depends upon facts
- **Technology licenses** alone are not covered transactions, but may be a factor in determining whether an “other investment” is covered

Covered Transactions: Non-controlling “Other Investments”

- Equity of 10% or less, plus:
 - Access to material nonpublic technical information
 - Board representation or observership
 - Involvement in substantive decision-making regarding “critical technology,” “critical infrastructure,” or “sensitive personal data” U.S. businesses (“TID U.S. businesses”)
- Interim FIRRMA regulations expanded jurisdiction to “other investments” in U.S. businesses involved in “critical technology” in 27 U.S. industries
- Proposed FIRRMA regulations will expand jurisdiction to “other investments” in TID U.S. businesses

Investments in Start-Ups

Not “covered”:

Corporation A, a foreign person, forms a start-up (“greenfield”) investment in the United States. The foreign investor also undertakes activities such as arranging for the financing and construction of a plant to make a new product, buying supplies and inputs, hiring personnel, and purchasing the necessary technology.

“Covered”:

Corporation A, a foreign person, intends to make an early-stage investment in a start-up company in the United States. Prior to the investment by the foreign person, the start-up has incorporated, established a domain name, hired personnel, developed business plans, sought financing, rented office space, and engaged in other activities that constitute interstate commerce in the United States, without the involvement of the foreign person.

Venture Capital and Private Equity Investment

- FIRREA exempts investment funds with foreign LPs from CFIUS jurisdiction over “other investments” in TID U.S. Businesses, if:
 - The fund is managed exclusively by a GP or managing member;
 - The GP or managing member is a U.S. person;
 - The foreign LPs do not have the ability to control the fund;
 - The foreign LPs do not have access to any material nonpublic technical information; and
 - If the foreign LP sits on an advisory board, the board does not have the power to approve, disapprove, or control the investment decisions of the fund or other decisions made by the GP or managing member
- CFIUS may, but is not obligated to, apply the same criteria to determine whether a controlling investment by a U.S. fund with foreign LPs is a covered transaction subject to CFIUS jurisdiction

Which Investments Require CFIUS Clearance?

Mandatory Declarations

- Mandatory declarations for “control” and “other investment” transactions covered by the Pilot Program established in the October 2018 interim regulations
 - U.S. business that produces, designs, tests, manufactures, fabricates, or develops a critical technology that is either utilized in connection with the U.S. business’s activity in one or more Pilot Program industries, or designed by the U.S. business specifically for use in one or more Pilot Program industry
 - Pilot Program industries defined by 27 NAICS codes including manufacturing of semiconductors, aircraft, optical instruments, and various military items, and R&D in biotech and nanotech
- Declarations will be mandatory if a foreign government has a “substantial interest” (49% or more voting interest, direct or indirect) in a foreign person acquiring a “substantial interest” (25% or more voting interest, direct or indirect) in a TID U.S. business

Critical Technology

- Critical Technologies are:
 - Defense articles or services subject to International Traffic in Arms Regulations
 - Items on the Commerce Control List subject to Export Administration Regulations for reasons relating to national security, chemical and biological weapons, nuclear proliferation, missile technology, or regional stability.
 - Certain nuclear equipment, materials, parts and components regulated by the Department of Energy and the Nuclear Regulatory Commission
 - Select agents and toxins
 - “Emerging and foundational” technologies identified through a Commerce Department-lead interagency process
 - Separate rulemaking processes for “emerging” and “foundational” technologies. “Emerging” is in early stages; “foundational” has not been launched
 - One or both will likely cover: biotech; AI and machine learning technology; microprocessor technology; advanced computing technology; quantum information and sensing technology; and robotics

NAICS Codes

- What is the North American Industry Classification System (NAICS)?
 - Census industry codes; there are over 1,000 NAICS codes
- Code for Semiconductor and Related Device Manufacturing (334413):
 - This U.S. industry comprises establishments primarily engaged in manufacturing semiconductors and related solid-state devices. Examples of products made by these establishments are integrated circuits, memory chips, microprocessors, diodes, transistors, solar cells and other optoelectronic devices
- Code used by many fabless semiconductor companies

CFIUS Process

Three-Phase Process

- Statute provides for decision in three stages within a total of 120 calendar days:
 - **First:** Initial 45-day review. Most cases are completed at the end of this stage
 - *Director of National Intelligence delivers threat assessment at Day 30*
 - **Second:** At end of the initial review stage, CFIUS may initiate a full investigation, lasting up to another 45 days
 - *Presumption of investigation if case involves government-controlled acquirer or critical infrastructure*
 - *CFIUS may initiate a one time extension of an investigation for 15 days*
 - *In extraordinary circumstances due to a force majeure event or to protect national security*
 - **Third:** If case remains unresolved, then CFIUS may refer the matter to the President, who has 15 days to act
 - *CFIUS itself may take action at end of second stage, without referral to the President*

CFIUS National Security Risk Analysis and Resolution

- CFIUS analyzes the “threat” posed by the investor and the “vulnerability” of the target to determine the national security consequences of foreign control
- If CFIUS determines there is a national security, various options to resolve:
 - Existing statutory authorities (e.g., export controls)
 - Blocking transaction: least-favored option
 - Mitigation agreements
 - Wide range of possible measures:
 - Divestiture of sensitive businesses
 - Structures to isolate foreign influence, creating passive investment position
 - Simple technology control plans and procedures
 - Third-party audit requirements
 - Appointment of “security directors”
 - Mitigation agreements are principally a problem for the investor or acquirer, not the seller

CFIUS and Investments in U.S. Semiconductor Industry

Blocked Investments in Semiconductor Companies

- **Fujian Grand Chip/Aixtron (December 2016)**

- “The national security risk posed by the transaction relates, among other things, to the military applications of the overall technical body of knowledge and experience of Aixtron, a producer and innovator of semiconductor manufacturing equipment and technology, and the contribution of Aixtron’s U.S. business to that body of knowledge and experience.” (Treasury Department)

- **Canyon Bridge/Lattice (September 2017)**

- “The national security risk posed by the transaction relates to, among other things, the potential transfer of intellectual property to the foreign acquirer, the Chinese government's role in supporting this transaction, the importance of semiconductor supply chain integrity to the U.S. government, and the use of Lattice products by the U.S. government.” (Treasury Department)

- **Broadcom/Qualcomm (March 2018)**

- “Reduction in Qualcomm’s long-term technological competitiveness and influence in standard setting would significantly impact U.S. national security. This is in large part because a weakening of Qualcomm’s position would leave an opening for China to expand its influence on the 5G standard-setting process.” (Treasury Department)

Many Other Failed Deals with Semiconductor Companies

- Public examples:
 - Go Scale Capital/Philips Lumileds
 - Hubei Xinyan/Xcerra
 - San'an Optoelectronics/Global Communications Semiconductors
 - Unisplendour/Western Digital
 - Infineon/Cree (Wolfspeed)

Considerations for Investments in Your Company

Foreign Investment Considerations

- **U.S. business**
 - Is your company's technology export controlled?
 - What is your company's NAICS code?
- **Foreign Investor**
 - What country is the investor from?
 - Percentage of investment
 - Rights of investor
- **Time between signing and closing**
 - Plan for at least 75 days to prepare CFIUS notice, secure initiation, and obtain clearance at end of review stage
 - Plan for at least 120 days for transaction subject to investigation
- **Filing Fees**
 - FIRREA authorizes filing fees (1% of the transaction value up to \$300,000)

Thank you!

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